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Petitioner,

SON COMPANY OF
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Respondent.

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SECOND CIRCUIT.

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FOR LEAVE TO FILE
AE ON THE MERITS.

AUNCEY NEWLIN
Amicus Curiae
14 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 357.

UNITED STATES,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY *AMICUS CURIAE* FOR A REHEARING, AND, IF GRANTED, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON THE MERITS.

The undersigned, as *amicus curiae* and in behalf of taxpayers generally, respectfully moves the Court for a rehearing of this case and, if granted, for leave to file a brief *amicus curiae* on the merits.

This motion is made for the following reasons:

I.

The decision for the Respondent will mean hardship to many thousands of taxpayers whose case, as such, was not presented to the Court.

The case of the taxpayer before the Court was a unique situation which made it advantageous to it to argue against the interest of taxpayers generally. While the Petitioner, the Government, stood to gain a certain amount from a decision in its favor, it stood to gain a great deal more from taxpayers generally by a decision against it under which countless deductions would be long delayed. Consequently, in substance, the proceeding was not an adversary proceeding.

The Government presented to the Court an argument supporting one theory favoring taxpayers generally. The Government ignored an alternative theory, also favoring taxpayers generally (see Point VI). Furthermore, it is believed a number of things, outlined below, could and should have been brought to the Court's attention, and that these things well might have resulted in a different decision.

II.

It is generally recognized that in the field of taxation questions should be answered on the basis of practical considerations and without unnecessarily producing unreasonable results. For taxpayers generally, this decision will have harsh consequences, for which there is no necessity.

Under the decision, a taxpayer who pays a disputed amount, which is deductible for Federal income tax purposes, and which is later determined to be due, is out of pocket the full amount from the date of payment but is entitled to no Federal income tax deduction until much later. Under the prior rule, he was entitled to an immediate deduction, and, assuming a Federal income tax rate of, say, 50%, he was out of pocket, net, only one-half of the disputed payment, and he had the use of the other one-half.

The effect of the decision is that taxpayers will be forced to overpay their taxes, pending resolution of the

dispute. As long as the dispute is pending it is uncertain whether the overpayment is to the City or to the Federal Government, but it is certain an overpayment has been made to one or the other, or both. Governmental authorities meanwhile have the use of money which admittedly is not due to them. No rule which requires a taxpayer to advance to governmental authorities money which, by admission, he does not owe is reasonable or fair. Yet, such is the effect of this decision.

III.

The decision will result in a number of other unreasonable practical consequences to taxpayers generally.

In a real estate certiorari proceeding, the real estate tax recovery, if any, usually is a fraction of the amount claimed (the example in the opinion assumes one-third). Under the decision, the amount disputed but found due (two-thirds) is allowed as a deduction in a year much later than the year for which it was assessed and paid, and it is allowed as a deduction in a year to the business of which it is not related. Consequently, net income (for Federal income tax purposes) of the respective fiscal periods is not fairly reflected.

Furthermore, again as indicated by the example in the opinion, it is customary, for reasons of economy, to dispose of certiorari proceedings in blocks of years (the example uses five years). Under the decision, in the example used the upheld accumulated disputed amount for five years is allowed as a deduction in one year, the year of settlement, thus distorting net income of that year, and unrealistically attributing to that one year expenses actually related to the business of a long period of prior years.

In real estate certiorari proceedings there is no escape from making a claim as large as might possibly be allowed,

while recognizing that, realistically, there is little likelihood of the total claim being allowed. (In the example in the opinion it is assumed that one-third of the claim is allowed.) Consequently, under the decision, in order for a taxpayer to have a fair chance of a reasonably satisfactory result in his real estate certiorari proceeding, he is forced to forgo a Federal income tax deduction for years in respect to an amount which has been paid and which, in all probability, he will never recover.

IV.

The decision upsets uniformly accepted reasonable tax practice followed since the Federal income tax was adopted in 1913.

Until the *Dixie Pine* and *Security Flour Mills* decisions of the Supreme Court (1944), the rule was to allow the real estate tax payment as a deduction in the year of payment, and if later there was a refund, to adjust the deduction taken in the earlier year unless an additional assessment for that year was then barred by the statute of limitations, in which case the refund was treated as income in the year of the refund. *Elliott*, 45 BTA 82 (1941).

Following *Dixie Pine*, the rule was to allow the deduction for the full amount paid in the year of payment and to treat any refund as income in the year of the refund. *Bartlett* v. *Delaney*, 173 F. 2d 535 (C. A. 1, 1949), cert. denied, 338 U. S. 817.

However, it was *always* recognized that the taxpayer was entitled to deduct *in the year of payment* at least *the amount finally determined to be due and never refunded.* The only modification that was made following *Dixie Pine* was with respect to the treatment of any amount refunded, that is, the amount finally determined *not* to be due. As noted, in the pre-*Dixie Pine* period this refunded amount

was dealt with by an adjustment in the year of payment, and in the post-*Dixie Pine* period the earlier year was not adjusted and the refund was treated as income when received.

Never, before the instant decision, was a rule applied under which the taxpayer was allowed no deduction in the year of payment for the amount ultimately found to be due. To allow no deduction in the year of payment *for this amount* is a wholly new concept and, as noted above, it is a rule which has very harsh consequences for taxpayers generally. The circumstance that for almost 50 years the rules were such as not to require such results proves that they are not required. It would seem only the most compelling reasons would warrant a change at this late date. The opinion indicates these things were not brought to the Court's attention.

V.

The decision will create doubt and confusion in the administration of the tax laws because it is not clear from the opinion (i) whether it applies to cash basis taxpayers, and (ii) whether it only applies to disputed real estate taxes paid under the circumstances represented by the record in the case.

As to cash basis taxpayers, the opinion seems to conclude that in the *Consolidated Edison* case there was no "payment" in the sense of an amount remitted in discharge of an obligation, and that the amount was a mere "deposit" in the nature of a "cash bond." If such an amount is not a payment by an accrual basis taxpayer, it is not a payment by a cash basis taxpayer. Therefore, it would seem to follow that the decision applies to cash basis taxpayers as well as to accrual basis taxpayers. However, the opinion leaves the question in doubt.

As to whether the decision applies only to disputed real estate taxes, the apparent rejection by the Court of the decision in *Chestnut Securities Co.* v. *United States* (Ct. Cl.), 62 F. Supp. 574, which involved a state income tax, indicates the decision may apply to any disputed payment otherwise deductible. If such is the case the decision will adversely affect, sooner or later, most taxpayers since in the course of any taxpayer's total experience he is likely to make an otherwise deductible payment which he does not consider he owes and which he thereafter seeks to recover.

If the decision is limited to payments under the circumstances presented by the *Consolidated Edison* case—namely, where the taxpayer, in order to dispute the local tax, is under compulsion to pay or risk seizure and sale of the property and 7% interest—the result is paradoxical. It means that if the taxpayer has no choice except to pay, his deduction is long deferred, but if he can elect either to pay and seek a refund, or to dispute without payment, he is entitled to an immediate deduction if he pays.

VI.

The decision was rendered without argument to the Court of the validity of the rule, in effect until the *Dixie Pine* decision, of adjusting the deduction taken in the year of payment in the event of a subsequent refund. This rule was followed for 30 years, that is, until the *Dixie Pine* decision. See *Bartlett* v. *Delaney, supra.* It is the rule which best reflects net income. See *Elliott, supra.*

The rule is consistent with the "all events" test since, as to the portion of the tax ultimately determined to be due, the obligation was discharged when the tax was paid.

It is submitted this rule should have been critically examined before the decision was made. In a case which

has such widespread application, and where so many taxpayers are seriously affected, every aspect should be considered.

VII.

The decision in the *Consolidated Edison* case should be reconsidered in the light of the decision of the majority of the Court in *American Automobile Association* v. *United States*, No. 288. In the AAA case the cash amount received was taxed as income when received, although services were still to be rendered. In the Con Ed case, the cash amount paid out was not allowed as a deduction although the taxpayer was out of pocket the cash involved and had paid whatever amount he owed.

It is submitted these results are inconsistent. If under the "all events" test the payment is not deductible, under the same test a receipt which is not yet earned is not accruable as income.

VIII.

In reaching its conclusion in this case, the Supreme Court relied on the fact that it was

> "stipulated by the parties in this case [that] the remittance or 'payment' did not admit, but specifically denied, liability for, and was not intended to satisfy, the contested $15 of the assessment, but was, in effect, a mere deposit 'in the nature of a cash bond for the payment of [so much, if any, of the contested] taxes [as might] thereafter be found to be due.'"

It is submitted such a stipulation is erroneous. All real estate tax payments to the City of New York—whether the subject of certiorari proceedings or not—go into the general revenues of the City, and if any refund later is

made interest is payable. 59 McKinney's Consolidated Laws of New York, Part 2, §296.

No distinction is made by the City between those amounts which are paid without question and those which are "disputed." A real estate tax payment made under such circumstances is not a "mere deposit" in the nature of a "cash bond."

While parties to a litigation may be free to stipulate as they wish, an erroneous stipulation should not adversely affect many thousands of other taxpayers who were not parties to the stipulation.

Timeliness of this Motion.

It is recognized that Rule 58, §1 of the Supreme Court Rules provides that a motion for a rehearing may be filed within twenty-five days after judgment or decision. It is noted, however, that the Court's decision in the *American Automobile Association* case, which is one of the grounds for asking for a rehearing, was rendered twenty-eight days after the decision in the *Consolidated Edison* case, and that the Court adjourned for the summer on the day the decision in the AAA case was announced.

It is also submitted that, since this motion is being filed, not by one of the parties, but in the interest of taxpayers generally, usual rules of timeliness should not operate against them.

Respectfully submitted,

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September 1961

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